No. 11,544.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MILTON R. BROWN,

Appellant,

vs.

M. R. LUSTER and A. M. LUSTER, partners doing business in the partnership name, Sunbeam Furniture Company,

Appellees.

BRIEF FOR APPELLANT.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

STATUTES

TEXTBOOKS

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BRIEF FOR APPELLANT.

Jurisdiction.

Claiming to be entitled to the benefits of Section 8 of the Selective Training and Service Act of 1940, as amended, appellant Milton R. Brown, a veteran of the armed forces, brought this suit for reemployment and compensation for loss of wages and benefits, against his former employers, appellees M. R. Luster and A. M. Luster, in the District Court of the United States for the Southern District of California.

The District Court denied his petition, and the veteran appeals.

Jurisdiction of the District Court was based on Section 8(e) of the Act aforesaid [50 U. S. C. A., App., Sec. 308(e)].

Jurisdiction of this Court over the appeal rests on Judicial Code, Sec. 128(a)-First [28 U. S. Code, Sec. 225(a)-First].

Statutes Involved.

The statutes involved include:

Section 8 of the Selective Training and Service Act of 1940, as amended [50 U. S. C. A., App. Sec. 308; 54 Stat. 890, 56 Stat. 724, 58 Stat. 798, and 60 Stat. 301, 341];

Section 16(b) of said Act, as amended [50 U. S. C. A., App. Sec. 316 (b); 54 Stat. 897, 59 Stat. 166, and 60 Stat. 181, 342]; and

Section 7 of the Service Extension Act of 1941, as amended [50 U. S. C. A., App. Sec. 357; 55 Stat. 627, 58 Stat. 799, and Act of Aug. 6, 1946, Chap. 936, 60 Stat. .....].

The reemployment benefits of Section 8, *supra,* were extended by the Service Extension Act of 1941 to "any person who shall have entered upon active military or naval service in the land or naval forces of the United States" between May 1, 1940 and the end of the war. Said Section 8, *supra,* was saved from expiration on March 31, 1947, the day other sections of the Selective Training and Service Act expired, by an amendment to Section 16(b), *supra,* which amendment prolongs the life of Section 8 indefinitely.

The particular statutory language necessary to be construed and applied in this case appears in Section 8(b, c, e) of the Selective Training and Service Act as follows:

> "(b) In the case of any such person who, in order to perform such training and service, has left or

leaves a *position,* other than a temporary position, *in the employ of any employer* * * *

> "(B) If such position was in the employ of a private employer, *such employer shall restore such person to such position or to a position of like seniority, status and pay* unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *"

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered as having been on furlough or leave of absence* during his period of training and service in the land or naval forces . . . and shall not be discharged from such position without cause within one year after such restoration.

"(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the District Court of the United States for the district in which such private employer maintains a place of business, shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to *specifically require* such employer *to comply with such provisions,* and, as an incident thereto, *to compensate such person for any loss of wages or benefits* suffered by reason of such employer's *unlawful* action. * * *" (Emphasis supplied.)

Rulings of the District Court.

The undisputed facts include the following:

Appellees are wholesale furniture jobbers, and maintain a place of business at Los Angeles, California. Appellant was employed by the appellees as a traveling salesman, on commission, with an exclusive sales territory until February 26, 1943, when he left such employment in order to enter upon military service. On his departure, it was agreed between the appellant, the appellees and Ben Harris, the salesman who suceeded him therein, that upon his return from military service, appellant would be restored to his former sales territory. [R. pp. 69-71.] On his return, he immediately applied on March 9, 1946, for restoration thereto and was refused, although it was neither then nor thereafter, impossible or unreasonable for the appellees to restore him to said territory. [R. pp. 5, 36, 84.] In lieu of his former territory, the appellees offered to employ him as their salesman in another exclusive sales territory, which he considered less remunerative and less desirable than his former territory; and he rejected the offer for that reason. [R. pp. 26, 71-72, 94-98.] From March 1, 1946 to September 1, 1946, Ben Harris, the succeeding salesman, earned $6,387.16 in commissions from the sales of appellees' goods in appellant's former territory. [R. pp. 15-16, 27.] Figures for September, 1946, were not produced by the appellees. [R. pp. 16, 27, 39-40, 43, 88-92.] From April, 1946, until the date of trial (October 1, 1946), appellant earned $150 per week in other employment. If he had been restored to his

former territory he would have had to bear his own traveling expenses, which formerly ran to about $250 per month. [R. p. 27.]

The District Court dismissed the petition on the sole ground that the appellant's employment by the appellees was never in *"a position in the employ of any employer,"* within the meaning of Section 8(b), *supra.* The Court held that appellant was an "independent contractor," and as such not entitled to the benefits of the reemployment provisions. [Concl. 2, R. p. 28.]

However, the Court made, either inferentially or expressly, two further findings of fact pertinent to appellant's ultimate rights, to-wit:

(1) That: "Petitioner (appellant) has therefore suffered no damage, benefits or wages as contemplated by Section 308(e) of the Selective Training and Service Act of 1940." [Findings 7 and 8, R. p. 27.]

(2) That if appellant had accepted the other territory offered by the appellees, he "would have been restored to a position of 'like seniority, status and pay' similar to that held by petitioner (appellant) prior to his entry into military service." [Finding 6, R. p. 26.]

Appellant contends that the finding that he had suffered no loss of wages or benefits was both (a) mathematically inaccurate, and (b) involved an erroneous view of the proper measure for computing damages when an exclusive sales territory is wrongfully invaded, or appropriated, by an employer through another salesman.

He also contends that the finding that the offered position in another territory was one of "like seniority, status and pay" was both (a) immaterial, because even if correct, the employers' obligations under the reemployment provisions were not thereby fulfilled, nor appellant's rights affected; and also (b) that the finding is not supported by the evidence.

Questions Involved.

1. Did appellant have "a position in the employ of any employer" while employed by the appellees as their traveling salesman on commission with an exclusive sales territory?

2. Were the appellees required to restore appellant to the same position and territory upon his return and application therefor, either by law or agreement, where their circumstances had not so changed as to make it impossible or unreasonable for them to do so?

3. Was the position as salesman in another exclusive territory, offered on his return, an offer of a "position of like seniority, status and pay" to his former position?

4. What measure should be applied in computing appellant's "loss of wages or benefits" suffered by reason of the continued invasion and appropriation of his exclusive sales territory by the appellees?

5. Did the appellant suffer any such loss of wages or benefits from March 9, 1946 to September 1, 1946; and if so, in what amount?

STATEMENT OF THE CASE.

The Pleadings.

The Petition: The petition was filed August 23, 1946. [R. p. 8.]

It charged that the appellees M. R. Luster and A. M. Luster were partners doing business in their partnership name Sunbeam Furniture Company; that they maintain their principal office at Los Angeles, California, within the jurisdiction of the District Court; that their business is furniture jobbing, *i. e.,* selling at wholesale lamps, pictures and items of so-called occasional furniture, to retail dealers in a trade area embracing all of Southern California, from Fresno and Paso Robles south to the Mexican border; that this trade area is divided into two sales territories, one consisting solely of the City of Los Angeles, and the other of all of said trade area outside the City of Los Angeles; that appellees use one exclusive salesman in each of said two territories, and have so conducted their business since April, 1942. [R. pp. 2-3.]

The petition charged that appellant Brown left a position as "out-of-town" salesman in the employ of the appellees on February 26, 1943, in order to perform training and service in the United States Army under the requirements of the Selective Training and Service Act of 1940; that he was inducted into said army the next day (February 27, 1943), and satisfactorily completed his period of training and service, was honorably discharged therefrom, and received a certificate thereof on March 9, 1946, and on the same day (March 9, 1946), he applied to the appellees for reemployment; that he was then, and has ever since been, still qualified to perform the duties of his

former position, and that the appellees' circumstances had not then, and have not since, so changed as to make it impossible or unreasonable for them to reemploy and restore him to his former position in their employ; but that the appellees then failed and refused, and have ever since continued to refuse, to reemploy him in his former position, or in any other position of like seniority, status and pay, contrary to law. [R. pp. 4-5.]

The petition further charged that appellant has at all times been, and is now, ready and willing to render all the services required in his former position, but has been prevented from doing so solely by reason of the appellees' unlawful actions; that he promptly availed himself of the services of the Selective Service System to negotiate with the appellees for relief from such refusal and said negotiations having failed, he brings suit to enforce his reemployment rights through the United States Attorney. [R. p. 5.]

The position averred that as "out-of-town" salesman for the appellees from April, 1942, until February 26, 1943, he was the exclusive salesman of the appellees within the sales territory above described, outside of the City of Los Angeles, *i. e.,* from Fresno and Paso Robles south to the Mexican border; that his duties were to travel said territory and solicit sales from the appellees' customers therein, and about once a week to attend a sale display of appellees' goods in Los Angeles; to perform all such services under appellees' direction and control, and subject to their satisfaction, and subject to discharge at their pleasure; that the goods sold were appellees' goods, and that they fixed and determined the prices and terms of all sales; that his hours of work and the manner of the per-

formance of his duties were always subject to their control; that appellant's headquarters was appellees' office in Los Angeles; that his position was not temporary; that appellant paid his own traveling expenses; that his compensation was seven and one-half per cent of the sale price of all the lamps and pictures, and six per cent of the sale price of all the occasional furniture, sold by the appellees to any customers in appellant's said exclusive sales territory, regardless of whether or not the appellant actually secured the orders therefor; and that his average total earnings amounted to about $600 per month, computed and paid to him by the appellees once a month. [R. pp. 3-4.]

The petition averred that when the appellant entered the army, the appellees employed another salesman for his territory, and that the successor salesman has held the territory to date, under an agreement for a commission of 5 per cent on the sale price of all lamps, pictures and occasional furniture sold by the appellees within such territory, regardless of who might secure the orders; and that, even at such reduced rate of commissions, said successor salesman has made, for the two years last past, approximately $9,000 per year in commissions, or $750 per month, over his traveling expenses. The petition averred that the appellant would have earned commissions at that rate or more, ever since March 9, 1946, if he had been restored as appellees' "out-of-town" salesman at the rates of commission formerly enjoyed by him; and that he has lost $500 per month, more or less, ever since March 9, 1946, by reason of appellees' unlawful refusal to restore him thereto, and will continue to suffer a further loss at the same rate until restored. [R. p. 6.]

The petition averred that appellant's personal acquaintance as salesman in his former territory is of value to him, and that he would be handicapped in a territory where he is relatively unacquainted, and that placement in a territory where he is not well acquainted would not be restoration to a position of like seniority, status, and pay; that after March 9, 1946, the appellees offered to employ him as their exclusive salesman for the City of Los Angeles territory; but that as a sales producing territory for the appellees' goods, said "city" territory has always been, and is now, inferior to the "out-of-town" territory formerly held by appellant; and that it would be practically impossible for appellant to earn, in the "city" territory, commissions equalling those he should be earning now in his former territory. [R. pp. 6-7.]

The petition prayed that the appellees be specifically required to reemploy him for one year in his former position and territory, at his former rates of commission, subject to discharge solely for legal cause; and that they be required to compensate him for his loss of wages and benefits at the rate of $500 per month, or such other amount as may be just, from March 9, 1946, until such future restoration; that the court costs be taxed to the appellees; and that appellant have general relief. [R. p. 8.]

The Answer: The appellees' answer averred that they did business as partners from April, 1942, until October, 1942, as the Sunbeam Lamp Co., and thereafter as the Sunbeam Furniture Sales Co., which is the correct partnership name, rather than the Sunbeam Furniture Company; that the appellees operate throughout the entire West Coast and in other places in the United States, as

well as in the Southern California trade area described in the petition. [R. p. 9.]

The answer alleged that while appellant was the appellees' "exlusive salesman in the territory" mentioned in the petition, he did not serve them exclusively, but acted also "as salesman for other companies carrying other lines of merchandise in the furniture field;" that he was *subject to discharge by appellees at their pleasure* at any time, there being "no contract of employment;" that they "had no control over his hours of work and/or the manner of the performance of his duties;" and the answer denied that their office in Los Angeles was appellant's headquarters, or that he earned $600 per month commissions on their sales. [R. pp. 10-11.] An application for reemployment by appellant during the first week in April, 1946, was admitted, but the appellees averred that they offered him "a position similar to the one in which he was engaged before induction into the military service, but in another territory." It was also admitted in the answer that the appellees "*have employed* another salesman in the territory formerly covered by the petitioner herein upon the basis outlined in the petition, and *admit that said salesman has earned approximately the amounts set forth in the petition.*" but that they "have no information or belief upon the subject whether or not the petitioner would have been able to earn the same compensation had he *been so employed.*" (Emphasis supplied.) [R. p. 12.]

The answer denied "that it is the personal acquaintance of the petitioner in the sales territory claimed by him as being of value," but alleged that "it is the ability to furnish merchandise after receiving orders that constitutes the item of value." That it is "not necessary for a salesman

to be acquainted personally with the trade in any territory, but only that he shall have proper and saleable merchandise to sell." The answer further averred that appellant refused their offer of "the right to act as their exclusive salesman in the territory of the City of Los Angeles," and denied that such "city" territory is an inferior territory "compared to the petitioner's out-of-town territory," and denied "that it would be impossible for the petitioner or any other person to earn in the city territory *as much as was earned* in the out-of-town territory." (Emphasis supplied.) [R. p. 13.]

As a separate affirmative defense, the appellees pleaded that appellant "was never an employee within the definition or contemplation of an employee, but was an independent contractor . . . handling and selling lines of other furniture jobbers or manufacturers or wholesalers for compensation at the same time he handled and sold the commodities of the respondent herein"; and that they never withheld social security, unemployment tax, or any other withholding tax, and that they paid and treated appellant as an independent contractor, and "had no other control over him" except "as to the territory that he was to cover for them." [R. pp. 13-14.]

The appellees averred that within one month after they "*declined to reemploy the petitioner,*" except for his services as their exclusive salesman in the City of Los Angeles, he went to work for the Los Angeles Chair Company and has since continued to be employed there, earning sums greatly in excess of "the amount of money *that he earned while employed by the respondents*"; and that appellant is not "a person entitled to the benefits" of the reemployment provisions. (Emphasis supplied.) [R. p. 14.]

The Evidence.

From December, 1937, until February 26, 1943, appellant was a traveling salesman, engaged in calling on retail furniture dealers in the "out-of-town" territory, *i. e.*, Southern California south of Fresno and Paso Robles outside the City of Los Angeles. [R. p. 73.] The parties stipulated that he is well acquainted with such retail dealers. [R. pp. 26, 43-44, 101.]

Appellant first traveled the territory for his brother, Charles S. Brown, a furniture manufacturer of Los Angeles, doing business in the name of Charles S. Brown Company. In this employment, he sold a line of upholstered living room furniture. [R. p. 55.] That job ended in May or June, 1942, when the brother, Charles S. Brown, closed out his business due to the war. [R. pp. 55, 97.]

For about three or four months in 1941, he also sold a novelty line of goods for the Milton L. Gould Company, consisting of pictures, lamps and some small occasional furniture items in the same territory. He did not handle the Gould line in 1942, nor thereafter. [R. pp. 61-62.]

From April, 1942, until his induction in the Army, he traveled the territory for the appellees, selling pictures, lamps and occasional furniture. After the Charles S. Brown Company connection ended in May-June, 1942, he traveled the territory *for the appellees alone,* and thereafter *sold no other lines* than those of the appellees. [R. pp. 51, 54-55, 68.]

The Charles S. Brown and the Milton L. Gould lines were the only others handled by appellant in the territory at any time. [R. pp. 54-56, 68, 80.] For the last nine months he handled only the appellees' merchandise.

The appellees were partners engaged in manufacturing lamps until about October, 1942. In about that month they went into the wholesale furniture jobbing business, according to appellee M. R. Luster, and have so continued to date. [R. p. 78.]

On July 1, 1946, the appellees converted their partnership into a corporation, in which they are the sole stockholders and officers. It is conceded that the appellees could, through their corporation, restore the appellant to his former position and territory in their employ, and that for purposes of this suit the identity of the partnership and the corporation is the same. [R. pp. 23, 74-75, 83-84, 110.]

At the opening of the trial counsel for the appellees stated:

> "If the court please, I believe that the principal issue that the court will be asked to dispose of is whether or not the petitioner in this matter is, as the respondents contend, an independent contractor and therefore not entitled to the benefits of the act under which he proceeds, or whether he is an employee. If the court should find that he is an employee, we can stipulate that the respondents' position *has not changed* so materially as to make it impossible to re-employ the petitioner in *the same* or similar job as the one he had before he entered the military service of the United States.
>
> "Further, there is the question of whether or not the job the evidence will show was offered to petitioner was in fact the same or similar job within the contemplation or meaning of the act and therefore his refusal would constitute such an action on his part as to not entitle him to the benefits of the act.

"I think these, your Honor, are the issues and we can stipulate to almost everything except that." [R. pp. 36-37.]

Later, appellee M. R. Luster testified:

"Q. And the corporation could through yourself and your father reinstate Mr. Brown in his former territory? A. Yes, we could." [R. p. 84.]

Mr. Luster did not deny the previous testimony of the appellant to the effect that at a meeting between himself, Ben Harris, and the appellant, on about February 15, 1943, at the store, it was agreed between the three that Harris would take over the appellant's territory while appellant was in the army and that the appellant would have it again when he came back. [R. pp. 69-70.] Mr. Luster did not deny either the meeting or the statements. [R. pp. 74-92, 107.]

The parties stipulated at the opening of the trial that the appellant rendered military service, and was honorably discharged therefrom, as asserted in the petition, and that he applied for reinstatement in his former position within due time thereafter. [R. p. 37.] It was also stipulated that he was qualified to perform the duties of his former position, and that his former rates of commission were, in fact, as stated in the above outline. [R. pp. 38, 108-109, 4, 7.]

Such commissions were payable only *after shipment* of the goods ordered, *not when the orders were taken.* [R. pp. 24, 54, 64-66.]

The parties stipulated that during the period prior to appellant's departure, "it was difficult to secure or make delivery of items of merchandise for which orders might

be taken," and that "it is relatively easier to make deliveries in 1946, although difficult." [R. p. 44.]

As a result, many orders taken by appellant in 1942-1943 were cancelled in April, 1943, because of the appellees' inability to make delivery of the goods, due to the war. Possibly $25,000 worth of such business was so cancelled [R. p. 65], and appellant received no commissions thereon. His commissions on cancelled orders, even at the six per cent minimum, would thus have been $1,500. [R. pp. 68-69.]

Although in military service, appellant continued to receive commission checks from appellees from February to May, 1943, on shipments for which he took orders from December 1, 1942, to February 26, 1943. [R. pp. 11, 101-103.]

The parties stipulated that Defendants' Exhibit "A" [R. pp. 15-16] contains a correct statement of the commissions earned by Ben Harris in appellant's former territory during January 1-August 31, 1946, under the improved delivery conditions [R. pp. 39-40, 42-43], to wit, $7,344.37, or an eight-month average of $919.27 per month. [The total $7,344.37 commissions earned in this period is found by substracting the $1,611.11 January 1 unpaid balance from the $8,955.49 total commissions shown on Exhibit "A."]

Former earnings by appellant in the same territory, under less favorable conditions, are not as clearly shown by the proof and findings of the Court, as are Harris' 1946 earnings.

At the beginning of the trial the parties stipulated, without contest, that the figures given in appellees' answer [R. p. 11] as to the amounts of commissions *paid to*

appellant per month from October, 1942, through April, 1943, were correct. [R. pp. 38, 59-60, 64-66.] Later, however, it was testified to by Mr. Luster himself, upon discussing Defendants' Exhibits "B" and "C" [R. pp. 17-22], that the stipulated figures in the answer are incorrect, and that appellant was actually paid the larger sums listed on said Exhibits "B" and "C." Mr. Luster personally copied these figures from the appellees' ledger book, and then rechecked them during the trial, after the differences between the exhibits and the answer were called to his attention. *He declared the former are correct.* [R. pp. 17-22, 76-77, 86-87, 107.]

Nevertheless, the District Court, in its oral opinion, still adhered to the figures in the answer, in discussing appellant's pre-military work, and failed to note in this oral opinion, that although he received commissions during March-May, 1943, appellant was not then working, but was in the army. [R. pp. 112-114.]

The correct figures shown on Exhibits "B" and "C" demonstrate that appellant took orders in the three months December 1, 1942, to February 27, 1943 (the date of his induction), upon which he was *paid* commissions totaling $1,935.66 during the six months, December 1942-May 1943, or a three-month-of-work average in excess of $600 per month, as charged in the petition [R. pp. 4, 101-104], without considering the orders cancelled in April, 1943.

Exhibits "B" and "C" also show the effect of the change in the type of business of the appellees in October, 1942, on appellant's earnings. [R. pp. 64, 78.] In the two years, October, 1940, through September, 1942, while the appellees were manufacturing lamps, appellant's total commissions on lamps were only $760.19. In the next three months (October-December, 1942) with furniture added,

appellant's commission payments were $1,082.63; and although in 1943 he worked only two months (January and February), he received commission payments in that year of $1,168.60. [R. pp. 17-19.] Total commission payments after October 1, 1942, were thus $2,251.23, attributable to five months of work (October, 1942, through February, 1943); and if the $1,500 of potential commissions on $25,000 of orders cancelled in April, 1943, be added to the $2,251.23 actually paid, a potential five-months-of-work average in excess of $750 per month is shown, further supporting the allegations of the petition that appellant was making "about $600" per month prior to induction. [R. pp. 4, 17-19.]

With improved delivery conditions in 1946, Ben Harris was making only $919.27 per month in this same territory, or about $750 per month more than his expenses, as alleged in the petition. [R. p. 6.]

The parties stipulated at the opening of the trial that the appellant "is personally and well acquainted with furniture dealers and purchasers of the products of the respondent in the trade territory described as Southern California outside of Los Angeles" [R. p. 43], and that "he is qualified to perform the duties of his former position" [R. p. 38]; also, that "he was the exclusive salesman for that territory in the sense that, and it is the fact that, he received commissions on the sales of all of the respondents' products delivered to any merchant or purchaser within his sales territory, regardless of whether he made the sale or not." [R. p. 42.] It was also stipulated that appellant was "offered the position of salesman in the City of Los Angeles territory" [R. p. 40], and that between July 1, 1941, and August, 1943, the appellees did not have a display of their goods at the Los Angeles Merchandise

Mart. [R. p. 46.] It was later stipulated that appellant was "diligent" in seeking relief through the Selective Service System. [R. p. 72.]

After these stipulations, the sole matters remaining for proof were the details reflecting the exact character of the employment relationship between appellant and the appellees, and showing whether the "city" territory was as desirable as the "out-of-town" territory. The proof on those points follows:

1. Employment Relationship.

Milton R. Brown testified: That his headquarters was, and that he covered his territory from, the Sunbeam Furniture Sales Company office at 1337 South Flower Street, in Los Angeles, where he went two or three times a week [R. pp. 50-53]; that he was there about half the Fridays, taking care of customers who might be in town, which was the practice in the wholesale furniture trade [R. pp. 51-53], and on every Saturday morning. That he got his mail and messages there from customers [R. p. 51], and there waited on customers, including Los Angeles customers, on the sales to whom he received no commission. [R. pp. 52, 55-56.] That the goods he sold were the goods of the Sunbeam Furniture Company alone, that the sales were made in their name, and were taken on order pads furnished by them, at prices which they fixed. [R. p. 51.] That he had nothing to do with collections. [R. p. 51.] That he was paid his commissions by check of the company, after shipments. [R. p. 52.] That the appellees held sales meetings of their salesmen, of which he was notified to attend, and which he attended. [R. pp. 56-57.] That he was instructed by them not to call on certain customers, because of financial reasons, and to call

on other specific customers. [R. p. 57.] That the appellees did not have him punch a time clock or report for duty at any particular time of the day, but that he knew he had to "get the business" to stay employed by them. [R. pp. 57-58, 63.] That he paid his own traveling expenses. [R. p. 58.] That his employment was not for any definite or fixed period of time, was terminable at will, and was verbal only. [R. p. 66.] That social security and unemployment taxes were not withheld from his commissions by the appellees, but that he does not believe they were withholding for income taxes at the time. [R. pp. 66-67.] That he was not given any sales quota to meet, but that from June 1, 1942, onward, he devoted his full time to the sale of the appellees' products alone. [R. p. 67.] That if he traveled for both his brother and the appellees simultaneously, at any time, it was for a period of not more than a month or six weeks, before June 1, 1942, and that after that date the appellees were his sole employers. [R. pp. 67-68.] That he took up the matter of the appellees' refusal of reemployment promptly with the Selective Service System, and has always been ready to go back to work for appellees in his former territory, ever since his application therefor. [R. p. 72.]

Melvin R. Luster testified: That he is a partner of his father in the Sunbeam Furniture Sales Company, which was incorporated on July 1, 1946, at the Sunbeam Furniture Company, with themselves as the sole stockholders and officers. [R. pp. 74-75, 83-84.] That it was not "necessary or required" of the appellant that he be at the Sunbeam store, or at the Los Angeles Furniture Mart, on Friday of each week, or on any day of the week. That he does not know how the appellant covered his territory

other than by automobile and by visiting the individual towns; but that the appellant would usually come to the office whenever he was in town to see if any new merchandise was available. [R. p. 79.] That the appellant was given no instructions as to fixed hours of work, or how he should travel, or as to his method of soliciting orders; that the appellees knew that he was also selling for other companies, to wit, Charles S. Brown and Milton Gould, and after June 1, 1942, did not require him to act exclusively as their sales representative in the territory. [R. pp. 80-82.] That they gave him no sales quota, nor instructions as to what customers he should call on, and did not withhold taxes on his commissions.

This was all the evidence on the character of the relationship between the parties.

2. "Similarity of Territories."

Milton R. Brown testified: That Barney Silver (sometimes spelled Silbers in the record) was the salesman in the "city" territory when he applied for reemployment. [R. p. 54.] That he believes that he could have earned, in the "city" territory, during April to September, 1946, amounts of money per month equal to those that were actually paid to him as commissions in the months October, 1942, to April, 1943, for traveling the "out-of-town" territory [R. pp. 59-60]; but that he turned down the offer of the "city" territory on his return because he "felt the (city) territory was not as lucrative as the outside territory," that there was not as much money to be made in the city territory, and that it "takes a good deal more work for less money." [R. p. 71.] Explaining the factors

which make the outside ("out-of-town") territory preferable to the city territory in the appellees' line of business, he said:

> "In my opinion the possibilities of more money on the outside is because you have more dealers to call on who are smaller stores. The Sunbeam Furniture Sales, except possibly for a small part of their line of business, are jobbers of merchandise which they purchase in the East and is sold by their salesmen here, and (if you) go to the larger stores in Los Angeles such as Barker Brothers, May Company and Bullock's, those large stores have the same access to that merchandise as Sunbeam Furniture Sales, and Sunbeam Furniture Sales naturally must make a mark-up in their price to stay in business, and I did not feel, and I believe I am right, in not wanting to sell larger stores that line of merchandise; and I didn't feel that I could make *anywhere near* the amount of money as in the outside territory.
>
> "In the outside territory, the dealers may not see you for six weeks and when they do see you they will buy a lot more than the larger dealers in town that may see you every day. There is no limit to what the dealers in the outside territory will buy, but that is not so with the metropolitan territory." [R. pp. 71-72.]

Melvin R. Luster testified on direct examination: That in his opinion it was possible for appellant to have earned "as a salesman in the City of Los Angeles *as much money per month as he earned in his prior employment with the respondent company as evidenced by (Defendants') Exhibits B and C.*" Also, on direct examination:

> "Q. Mr. Luster, do you have an opinion as to whether or not the territory of the City of Los An-

geles was as desirable to sell merchandise of the type sold by your company as was the outside territory? A. *Today* it is just as desirable.

Q. I am sorry but I didn't get your answer. A. I say today the Los Angeles territory is as desirable.

Q. Is there any particular reason for that? A. Yes. It is because we have changed our method of operation somewhat since 1942. Now we are manufacturing about *50 per cent* of the items we used to buy direct from factories and it enables us to go ahead and sell our merchandise to the large department stores in the Los Angeles area which was *something we were unable to do before.*" [R. pp. 78-79.]

Later, he was brought back to the same subject by his counsel, and was permitted to testify, over objection, that in his opinion, the territory offered appellant on his return was a "like position" to his former territory, "from the standpoint of income," "seniority" and "status." [R. pp. 82-83.]

On cross-examination, Mr. Luster said that he had the books of his company which show the amount of sales actually made in 1946; that their exclusive salesman in the city territory is Barney Silber, and that he had in hand the books from which he could give the commissions paid to Mr. Silber and Mr. Harris since the first of the year 1946. [R. pp. 84-85.] Asked to give those figures, he examined his books, and said:

"I don't seem to find the postings for commissions paid commencing January in the ledger. They evidently don't have that information in here. I can explain that also. I don't have the correct ledger here." [R. p. 85.]

It then developed that what he had was a bank control record book which showed no recipients of checks, and that he had nothing to show even the Harris commission payments. [R. pp. 85-88.] That he had not brought any ledgers showing the comparative Silber and Harris commission payments in 1946, in response to the appellant's subpoena therefor. [R. pp. 88-89, 91-92.]

On cross-examination, Mr. Luster testified that Al Feldman was the appellees' "city" salesman in 1940-1942; and he was asked to give the commissions paid to Mr. Feldman from October, 1942 to February, 1943, for the purpose of comparison with appellant's commissions in the same period. The Court, however, sustained appellees' objection to the evidence on the ground of "immateriality" and change of "conditions at the time the act requires reemployment." However, he then testified:

> "Q. Mr. Luster, it is a fact, is it not, that city salesman at the time Mr. Brown was the salesman down there did not earn or receive as much commission as Mr. Brown? . . . A. We did not employ a city salesman permanently, and we did not have Mr. Brown cover his territory. Consequently, his earnings would have been less than Br. Brown's.
>
> Q. Well, I didn't understand why you say that is true. A. His earnings would have been less because he worked on and off for us, never continuously." [R. pp. 90-91.]

Other than this, Mr. Luster gave no comparison of commission payments to support of his "opinion."

Charles S. Brown testified: That he is the appellant's brother, and that he has been in the furniture business in Los Angeles since 1921, as a manufacturer, wholesaler or retailer, but not as a jobber; and was in the furniture

manufacturing business from June, 1936 for six years, and is now the general manager of the Barker furniture stores in Los Angeles. [R. pp. 93, 100.] That the appellant ceased traveling for Charles S. Brown Company in June, 1942. [R. p. 97.] That he (the witness) has personally traveled the "city" and the "out-of-town" territories himself, and sold bedroom, dining room, living room and odd-piece furniture, and that the "out-of-town" territory is preferable for a jobber's or small manufacturer's salesman, and that it is accepted in the trade that there is "no comparison" between the two territories. [R. pp. 95-96.] That large eastern manufacturers will sell the large Los Angeles stores, and give them special, sometimes state-wide, exclusive arrangements, and salesmen handling those lines will find the city territory better, but not the salesman for the smaller manufacturer. [R. pp. 95-98.] That the large stores, such as Barker Brothers and Bullocks are not as interested in buying from salesmen as are the "out-of-town" dealers: and that statistics show that there are *twice as many* small retail stores in the "out-of-town" territory from Fresno south through San Diego, as there are in the City of Los Angeles. [R. p. 98.] That the outside territory is preferable, taking into account the increased cost of traveling the same. [R. p. 98.] That he has been engaged as a manufacturer or distributor of the type of furniture sold by Sunbeam Furniture Company. [R. p. 100.]

The Court, in its oral opinion, took note *sua sponte* of the expansion of building, and increase in population, "in Los Angeles County", as reported in the newspapers, and said:

> "In view of the testimony, the court is not required to pass upon whether or not the offer of the respon-

dents (appellees) is of like seniority, status and pay, but *if required to*, would hold that offer was in good faith made to the petitioner of like seniority, status and pay. The testimony of one of the respondents was to the effect that petitioner could have earned in April, May, June, July and August in the City of Los Angeles *the amounts of commission that he made prior to his induction.*

"The court holds, therefore, that the petitioner was an independent contractor and not entitled to be reinstated under the section of the law that the court has called attention to." [R. pp. 117-118.]

Finding of Facts, etc., Judgment and Appeal.

The District Court thereafter entered findings of fact and conclusions of law [R. pp. 23-28], and judgment dismissing the petition on October 16, 1946 [R. pp. 29-30]; and appellant filed his notice of appeal on January 13, 1947. [R. p. 30.] An extension of time for filing this brief until May 27, 1947, was granted by this Court.

Specification of Errors.

1. The District Court's Conclusion of Law No. 2, that appellant "failed to show that prior to his induction into the United States Army he held a 'position in the employ' " of the appellees, within the meaning of Section 8(b) of the Selective Training and Service Act of 1940, is erroneous, and not supported by the pleadings, the evidence, the Court's finding of facts, or the applicable law. [R. pp. 28, 31.]

2. The District Court's Conclusion of Law No. 2, that appellant's "contractual status was that of an independent contractor" and as such was "outside the scope of" the

reemployment provisions, is erroneous in law; and not supported by the evidence, or the Court's findings of fact, which clearly show that appellant was merely a "servant" of the appellees. [R. pp. 28, 31-32.]

3. The District Court erred in its finding that the offer of the City of Los Angeles territory was an offer of a "position like seniority, status and pay" to that of appellant's former territory and position; because such finding is not supported by the evidence. [R. pp. 26, 32, 117-118.]

4. The District Court erred in holding, by inference, that the offer of another territory, *i. e.*, the City of Los Angeles territory fulfilled the appellees' obligation to restore appellant to his former territory. [R. pp. 26, 32-33, 117-118.]

5. The District Court erred in its finding that appellant "suffered no loss of wages or benefits" prior to the trial, within the meaning of Section 8(e) of the Act aforesaid; because said finding is not supported by the evidence; and is (a) mathematically inaccurate, and (b) based on an erroneous measure for computing such loss. [R. pp. 27, 33-34.]

6. The District Court erred in failing to find that petitioner has suffered a "loss of wages or benefits" equal to the commissions he would have earned, at his former rates, on sales made in his former territory by other salesmen in appellees' employ after March 9, 1946, without any deductions for (a) traveling expenses or (b) earnings in other employment, *i. e.*, that he has suffered a loss slightly in excess of the $6,387.16 commissions earned by Ben Harris in the same territory for the period March 1 to September 1, 1946. [R. pp. 27, 34.]

ARGUMENT.

Summary

Appellant contends, within the meaning of Section 8 of the Selective Training and Service Act, as amended: (1) that he "left a position in the employ of any employer", regardless of whether under the law of torts, or under other statutes, his relation to the appllees could be classified as that of a "servant", "agent", "employee" or "independent contractor"; (2) that he was not offered "a position of like seniority, status and pay" by the appellees, and that, even if he was, he was entitled to be restored to his former territory, because it was not impossible or unreasonable for the appellees to do so; and (3) that he is entitled to be compensated for his "loss of wages or benefits" in a sum equal to the commissions, at his former rates, that he would have drawn on actual sales that have been made in his former exclusive sales territory from March 9, 1946, to the date of his future restoration thereto, undiminished by the probable traveling expenses he would have incurred in making such sales, or by any interim earnings from his other employment.

The Questions Involved, *supra*, and Specification of Errors, *supra*, fall logically into the three categories separately numbered above; and this Argument will be divided into three parts accordingly.

The District Court's principal reliance was placed on the opinion in *Levine v. Berman* (DC, ND, Illinois, 1946), as indicated by the reference thereto, in the Court's oral opinion. [R. p. 116.] The case of *Levine v. Berman* was reversed and remanded by the Seventh Circuit Court of Appeals on May 6, 1947, it being Case No. 9176 on

that Court's calendar.* Appellant relies on the appellate court's opinion ordering such remand, and on *Whitver v. Aalf-Baker Mfg. Co.* (DC, ND, Iowa, 1946), 67 F. Supp. 524, as well as other authorities cited below.

1. Appellant Had a "Position in the Employ" of the Appellees.

Reference is made to the summary of the evidence set forth above under the heading Employment Relationship, and also to the District Court's Findings of Facts [R. pp. 23-28], and to the admitted fact that his employment was terminable at will by the appellees [R. pp. 3, 10-11, 66-67], as showing that appellant did have "a position in the employ of any employer", under the Act.

The expression "position in the employ of any employer" is to be construed "as liberally as possible" in favor of returning veterans. *Kay v. General Cable Corp.* (3 CCA, 1944), 144 F. (2d) 653, 656; *Fishgold v. Sullivan Drydock & Repair Corp* (1946), 328, U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 960; *MacMillan v. Montecito Country Club* (DC, SD, Cal., 1946), 65 F. Supp. 240.

The expression "has left or leaves a position in the employ of any employer" was newly devised by the Congress, in legislating the manpower of the nation into military training for one year. It was clearly intended by that new phrase, to cover a wider field than is normally described by the word "employee", which was significantly omitted. *Kay v. General Cable Corp. supra.* By using

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*The opinion of the Seventh Circuit Court of Appeals in *Levine v. Berman* will probably appear in the Advance Sheets of Vols. 160 or 161 F. (2d) before hearing. If not, appellant will then move for leave to file certified copies of the same.

the new phrase, the Congress intended to avoid the legal confusion and conflicts that have grown up in the law of torts, and under particular statutes, as to the meaning and application of the words "employee" and "independent contractor." Its aim was to confer reemployment rights on any selectee who, in order to enter military training, should leave any "position in the employ of any employer."

The Congress manifestly intended that the words should have the broadest possible application, and that they should be given their *full sweep,* to the end that *every selectee* who rendered personal services to another for compensation, in a relationship other than temporary, might have that employment restored, unless it should be impossible or unreasonable for the employer to restore him.

In the *Kay* case the Third Circuit Court of Appeals said:

> "Of course, the words are not applicable to independent contractors, but, except for casual or temporary workers, who are expressly excluded, they cover *almost every other kind of relationship* in which one person renders regular and continuing service to another."

A true "independent contractor" is one who *contracts* to produce a specified result for specified compensation, by means of his own choosing. He cannot, with impunity, be discharged by his employer, except for cause; and he cannot, with impunity, fail to produce the result he has contracted to produce. In other words, his "position" is "temporary", *i. e.*, confined to a particular task, and he is for that reason, and that reason only, excluded from the coverage of the Act. *California Labor Code*, Sec.

3353; 45 *C. J. S.* 638-641, 31 *C. J.* 473-475, 39 *C. J.* 1315, 25 *C. J. S.* 580-582; *Restatement of the Law of Agency,* Secs. 2, 220, 236.

Such is the meaning implicit in the sentence quoted from the *Kay* case opinion, *supra.*

Etymologically, the words "a position in the employ of any employer" mean "a place in the use of a user of the services of another for compensation." *Black's Law Dictionary* (3d ed.), pp. 657-658. *Webster's New International Dictionary.* They would include even a true "independent contractor", but for the exclusion of "temporary positions" from the coverage of the Act. The word "employee", in its broadest connotation, includes an "independent contractor."

The words used have been liberally construed to include positions held by the following:

A physician. *Kay v. General Cable Corp., supra.*

A golf professional. *MacMillan v. Montecito Country Club, supra.*

A lawyer. *Clark v. Housing Authority.* (Wash., 1946), 171 P. 2d) 217.

A police officer. *Hancbuth v. Patton* (Colo., 1946), 170 P. (2d) 526.

A sales agent, on commission. *Lee v. Remington Rand, Inc.* (DC, SD, Cal., 1946), 68 F. Supp. 837.

A branch manager, sharing profits. *Anderson v. Schouweiler* (DC, SD, Idaho, 1945), 63 F. Supp. 802; *Salter v. Becker Roofing Co.* (DC, MD, Ala., 1946), 65 F. Supp. 633; *Dobbs v. Williams* (DC, Ariz., 1946), 68 F. Supp. 995; *Stanley v. Wimbish* (4 CCA, 1946), 154 F. (2d) 773.

A salesman on commission, with an exclusive sales territory. *Levine v. Berman* (7 CCA, May 6, 1947), to be reported; and *Whitver v. Aalfa-Baker Mfg. Co.* (DC, ND, Iowa, 1946), 67 F. Supp. 524.

The appellant in this case was clearly not an "independent contractor" because he did not contract to produce any particular quantity of business, and because he was *subject to discharge at will, i. e.,* without recourse. The right to discharge at will gave the appellees the *power* to control the means and methods by which he would perform his services: and the fact that, in the absence of instructions from the appellees, he worked according to his own ideas, or that he was paid on a commission basis instead of by the day, week or month, did not make him an "independent contractor." He was the "employee", or "servant" of the appellees in all his activities. *MacMillan v. Montecito Country Club, supra;* 16 *California Jurisprudence* 958-959; *Ryan v. Farrell* (1929), 208 Cal. 200, 280 Pac. 945; *Lee v. Remington Rand, Inc., supra; Claremont Country Club v. Indust. Accident Com.* 1917), 174 Cal. 391, 163 Pac. 209; *Phillips v. Larrabee* (1939), 32 Cal. App. (2d) 720, 90 P. 820.

The appellant's duties were simply to take orders for appellees' goods, in appellees' name, on appellees' order pads, from appellees' customers, at appellees' prices, on appellees' terms, subject to appellees' approval, in a territory fixed by the appellees; and to perform those duties to the appellees' satisfaction, subject to discharge with or without cause, at appellees' pleasure, and without recourse.

None of the elements of a true "independent contractor" thus appear in the record.

He was not even an "agent" in the sense that an agent may bind his principal by contract.

He was merely a "servant", entrusted, in the absence of specific instructions, to use a certain amount of discretion in performing his duties. None of the facts set forth in the District Court's Finding No. 5 [R. p. 24-26] militate against this conclusion.

Nor would it have affected the conclusion if the appellant had, without objection from the appellees, been also handling a line of merchandise for other concerns. "Shared servants" are not "independent contractors", for each employer has the power to control the common servant to the extent that he may consider necessary to his own business.

Nothing in the record supports the District Court's Conclusion No. 2 that appellant did not have "a position in the employ" of the appellees, within the meaning of the reemployment provisions. Whether his relation might be called that of an "independent contractor" under the law of torts, or under other statutes, is immaterial to this case; and the authorities cited above show that even in the law of torts, or under other statutes, his relationship in California would not be considered that of an "independent contractor."

Appellant was entitled to and was not excluded from, the benefits of the reemployment provisions.

2. "Position of Like Seniority, Status and Pay."

The evidence on this point is summarized under the heading "Similarity of Territories" *supra*.

The theory is implicit in the District Court's oral opinion and findings of fact [R. p. 26, 117-118], that because,

under improved business and delivery conditions in 1946, appellant could have made in the "city" territory *as much* in commissions as he did in his former territory prior to his induction, the appellees' offer of the "city" territory was a fulfillment of their obligations under the reemployment provisions.

A like theory followed by the District Court in *Levine v. Berman* was expressly overruled by the Seventh Circuit Court of Appeals in the Opinion heretofore referred to. The appellate court said:

> "So it was possible to give the petitioner his old territory with whatever allotment (of merchandise) the territory was entitled to. Nor do we think it unreasonable to require the respondent to do so. . . . *Since it was possible to restore the petitioner to his old territory he was entitled to it under the law.*" [Explanatory parenthesis inserted.]

This view of the meaning of the reemployment provisions of Section 8 of the Act is parallel to that of the Director of Selective Service, who, in Section 301.7 of his interpretative *Handbook—Veterans Assistance Program*, says:

> "In the event that a private employer's circumstances have so changed as to make it impossible or unreasonable for the employer to restore the veteran to his former position, the employer is obligated to restore the veteran to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make such restoration also impossible or unreasonable."

The Act itself declares in Section 8(c), that: "Any person who is restored to a position in accordance with

the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been *on furlough or leave of absence* during his period of active military service", etc. An employee normally takes a leave of absence from the duties of a particular job, *i. e.*, his previous employment continues without change pending his return. It has been held that one absent in military service is an "employee" of his pre-service employer. *In re Walker's Estate* (1944) 53 N. Y. Supp. (2d) 106; *Thompson's Estate* (1925) 126 Misc. 91, 213 N. Y. Supp. 426; *Howey v. Grier* (1929) 324 Mo. 634, 23 S. W. (2d) 1058. Presumptively, therefore, a veteran will return to the precise job he had before he entered military service; and that it is his legal right to do so is not negatived by the added statutory obligation of the employer to restore him to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

The provision for restoration to employment in a "like" position is an additional obligation imposed on the employer, and not an additional condition imposed on a veteran's right to be restored to his old job. If the Congress had intended the latter, it would not have provided for restoration "to such position", *i. e.*, to the veteran's former position; but would have simply directed that the veteran be given "a position of like seniority, status and pay", which, of course, would have included his old job, if the employer desired to place him therein.

The requirement that the veteran be "restored" to his former position "or a position of like seniority, status and pay" is a requirement that he be offered his old job first,

unless that is made impossible or unreasonable by the employer's changed circumstances.

With respect to sales territories, a returning veteran is entitled to his former territory, unless it is impossible or unreasonable to restore him thereto. *Levine v. Berman* (7 CCA, May 6, 1946) quoted above; *Whitver v. Aalfs-Baker Mfg. Co.* (DC, ND, Iowa, 1946) 67 F. Supp. 524; *Mihelich v. Woolworth Co.* (DC, Idaho, 1946) 69 F. Supp. 497; *Stanley v. Wimbish* (4 CCA, 1946) 156 F. (2d) 538; *Salter v. Becker Roofing Co.* (DC, MD, Ala., 1946) 65 F. Supp. 633.

Furthermore, the evidence in this case does not show that "a position of like seniority, status and pay" was offered to the appellant.

Note that the alternate position must be one of "like seniority" and "like status," as well as of "like pay."

Prior to his induction, the appellant's territory was admittedly the better of the two territories. The "city" territory had only half as many small furniture dealers in it as the outside territory. Commissions made therein were less; and were so small, in fact, that the appellees did not keep a salesman in it "permanently." Salesman worked it off and on, not regularly, according to Mr. Luster. And there was no evidence that the commissions actually earned in "city" territory ever have equalled those made in the "out-of-town" territory, *even in 1946.*

Therefore, the "status" of "city" salesman was necessarily inferior to that of the "out-of-town" salesman; and from the proof if would seem that his "seniority" must also have been inferior.

The proof is clear that the position offered appellant was inferior in status to his former position in the appellees' employ. To accept it would be obviously a demotion. There is nothing in the proof except the unsupported "opinion" of Mr. Luster, to indicate that it might have been possible, even in 1946, to earn as much in the city as in the out-of-town territory; and though he had access to the figures showing the comparative earnings in the two territories in 1946, Mr. Luster did not produce them. Other opinions, equally as good, and better founded on statistical facts, were that there is "no comparison" between the earnings of salesmen in the out-of-town territory and in the city territory.

The burden of proof was on the appellees to show that the city territory was one of "like seniority, status and pay"; and such proof as there is on the subject, is all to the contrary.

The same matter, to wit, whether a *guarantee of commissions,* in another territory, equal to the amount of those formerly earned by a returning veteran in his former territory, is an offer of "a position of like seniority, status and pay", was considered in *Levine v. Berman, supra.* The appellate court said:

> "We cannot therefore, say that it would be unreasonable, and certainly not impossible to restore the petitioner to his territory under allotment (of merchandise) at his old commission (of ten percent). We cannot say it is unreasonable unless we are to say that the returning serviceman shall not share in the abundant prosperity when he returns. We are not prepared to go that far. Indeed, the tenor and purpose of the Act guide us in a different direction. . . .

> " 'Unreasonable' means more than inconvenience or undesirable. *Kay v. General Cable Corporation, supra,* at p. 655. We think it means more than having to share the profits of a booming business inordinately prosperous because of the war the petitioner went away to serve in. Therefore, we do not think it impossible or unreasonable under the court's findings for the respondent to restore the petitioner to his *former status,* modified only by the necessity of an allotment (of merchandise), and to pay him his *old commission,* and the court erred in its conclusion of law that it was impossible or unreasonable." [Explanatory parenthesis inserted.]

Appellant's "pay" was determined by the sales price of merchandise sold, and was not a fixed sum per week or month. He is entitled to the same "pay" and to his former "status" and "seniority" in the appellees' employ. He is not limited by the actual amounts he formerly was able to earn under less favorable conditions.

The offer of the city territory is thus not shown by the proof to have been an offer of "a position of like seniority, status or pay;" and, even if it had been, such offer did not fulfill the appellees' legal obligation to restore the veteran *to his former territory* at his request.

Furthermore, the appellees agreed, when appellant left for military duty that, on his return, he would have his old territory restored to him. In all fairness, the appellees ought not to be successful in ignoring, at will or whim, both the law and their own agreement. The appellees have offered no reason for their refusal to give appellant his former territory. *They simply did not choose to do so.* That is the sole explanation of their actions indicated by the record.

3. "Loss of Wages or Benefits;" Proper Measure Therefor.

The District Court's finding that appellant "suffered no damage, benefits or wages as contemplated by" the re-employment provisions, is arithmetically inaccurate. For, even at his reduced rate of commission, Ben Harris earned $6,387.16 between March 1, 1946, and September 1, 1946; while at $250 per month, appellant's traveling expenses during this same six-month period would have amounted to only $1,500, and appellant earned only $150 per week in other employment from April, 1946 to September 1, 1946, or an outside total of $3,150 for the 21-week period. Result: $6,387.16 minus $3,150.00, minus $1,500.00, leaves a $1,637.16 loss of earnings, after deducting all possible items of charge. [See Findings 7 and 8, R. p. 27.]

The above "loss" figures are not carried through September, 1946, because Harris' earnings during that month were not disclosed by the appellees. But a substantial loss up to September 1, 1946, is shown by the proof. And the Court's contrary finding is not supported by the evidence. Since the appellee's answer admitted that Harris is making about $900 per month in appellant's former territory, it is probable that the above $1,637.16 loss was increased during September, 1946, and at the time of trial (October 1, 1946), was considerably more.

In *Boston & Maine Railroad v. Bentubo* (1st CCA, March 7, 1947), 160 F. (2d) 326, it was held that the power of the District Court to award a veteran compensation for his "loss of wages or benefits" is legally, historically and etymologically, similar to the power of the National Labor Relations Board to award "back pay" under *29 U. S. Code Sec. 160(c).*

This Court has held that the National Labor Relations Board is *not required by law* to reduce a back pay award by amounts an illegally discharged employee has earned in other employment. *N. L. R. B. v. Carlisle Lumber Co.* 9 CCA. 1938), 99 F. (2d) 533, 539-540, cert. den. 306 U. S. 646, 83 L. ed. 1045, 59 S. Ct. 586.

Appellant recognizes the fact that both the making, and the amount, of an award of a veteran's loss of wages, etc., are within the "sound discretion" of the District Court [*Boston & Maine Railroad v. Bentubo, supra,* p. 328-329]; but submits that a *finding of fact* that no loss is shown to have been suffered, when the evidence is to the contrary, is not a proper exercise of such discretion.

Appellant was entitled by law to be restored to his former territory, and commission rate, for one year; and has stood in the same relation to the appellees ever since March 9, 1946, as a commission agent, whose exclusive territory has been invaded by his principal in violation of their contract. His "loss of wages and benefits" should therefore, be measured by the amount of commissions he would have earned, at his former rate, on any goods sold by the appellees in his former territory since March 9, 1946, through Ben Harris, or otherwise. *Smythe Sales Inc. v. Petroleum Heat & Power Co.* (3 CCA, 1942), 128 F. (2d) 697, 700-701; *Brach & Son v. Stewart* (1925, Miss.), 104 So. 162, 41 A. L. R. 1172, and Note, pp. 1178-1184; *Agency,* Sec. 309, 2 Am. Jur. 241; *Schiffman v. Peerless Motor Car Co.* 1910), 13 Cal. App. 600, 110 Pac. 460; *Erskine v. Marchant* (1918), 37 Cal. App. 590, 174 Pac. 74; *Yaguda v. Motion Picture Publications, Inc.* (1934), 140 Cal. App. 195, 35 P. (2d) 162.

There is a conflict under the above authorities, as to whether an agent whose exclusive territory has been invaded or appropriated by his employer, should have his probable expenses, and his earnings in other employment, deducted from the total commissions lost. However, the "doctrine of mitigation of damages" is inapplicable in veterans' reemployment cases.

The "doctrine of mitigation of damages" has been rejected in favor of the "doctrine of constructive service" in nine states, to wit, Alabama, Arkansas, Massachusetts, Michigan, Mississippi, Montana, Pennsylvania, South Carolina and Louisiana. [Annotations: 8 *A. L. R.* 338, 5 LRA (NS) 453.] The Congress manifestly did not mean for awards of "loss of wages or benefits" to be measured by one doctrine in one district court, and by the other in another. There is nothing in the Act itself which, *per se*, indicates that the "loss of wages" is to be mitigated or diminished to any extent by earnings in other employment. And if the veteran has been ready and willing at all times, to serve in his former position, but has been unlawfully prevented from so doing by the employer, the "doctrine of constructive service" is equally or more applicable than the doctrine of mitigation.

That a veteran may have recouped his losses, in whole or in part, from other employment, not contributed to in any manner by the offending employer, is not a circumstance out of which the latter should be allowed to claim a benefit or windfall. Prima facie, a veteran's "loss of

wages" is the wage of the position to which he should have been restored, and inquiry as to the amount of his loss, should end at that point.

The doctrine of mitigation of damages in cases of wrongful discharge was evolved by the courts in pursuit of a "public policy." An employee wrongfully discharged must treat his discharge, although wrongful, as final, since the courts cannot restore him to employment; and, since it is "against public policy" for him to remain idle, he must seek employment elsewhere and thus diminish his damages. Such is the rationale of doctrine of mitgation. *McMullen v. Dickinson* (1895), 60 Minn. 156, 62 N. W. 120, 51 Am. S. R. 511; *Howard v. Daly* (1875), 61 N. Y. 362, 19 Am. Rep. 285. The rationale rejecting the doctrine is that it unjustly rewards an offending employer, and subsidizes breaches of employment contracts by employers. Annotation: 8 *A. L. R.* 347-349.

The rationale supporting the doctrine of mitigation is invalid, in the face of the courts' *new powers created* by, and *new public policy* declared in, the reemployment provisions. A veteran unlawfully refused reemployment is not bound to treat the refusal as final, the courts are not powerless to compel his reinstatement, and the government furnishes him investigatorial and attorneys' assistance, all to the end that the declared public policy, that he shall not be unlawfully denied reemployment, may be given effect.

When applied in such cases, the doctrine of mitigation is a subsidization of law violators, projected gratuitously

into a new field, in the face of a public policy adopted by the nation in defense of its very existence. It ought not to be indulged by the federal district courts in reemployment cases; especially in view of the fact that the equally logical doctrine of constructive service, already adhered to by many courts, is ready at hand to serve the *new public policy* that veterans shall be reemployed, mandatorily or otherwise, in their former positions.

Appellant, therefore, submits that he has suffered a compensable loss of wages and benefits, as shown by the proof, up to September 1, 1946; and that, since he has always been ready and willing to serve the appellees in his former territory, and has been prevented from doing so solely by reason of their unlawful conduct, he should be compensated for his interim loss in an amount equal to what he would have received at his former rate of commissions on sales made in his former territory since March 9, 1946.

Upon the remand, if ordered, the District Court should be instructed that it is within that Court's discretion to refuse to diminish appellant's compensable loss of wages by the amount of his earnings in other employment, or by the amount of possible expenses he would have incurred in covering his former territory; and that it was error for the District Court to find as a fact, on the proof adduced at the trial, that the appellant had suffered either no "loss of wages or benefits," or a less such loss, than is indicated above.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be reversed. Appellant was clearly entitled to the benefits of the reemployment provisions; the refusal to restore him to his former territory and rates of commission was clearly unlawful; and the offer of the "city" territory did not satisfy the appellees' reemployment obligations to the appellant, either in law or fact. Therefore, appellant should be ordered properly restored by the appellees, and they should be further required to compensate him for his loss of wages and benefits measured under the doctrine of construction service, without diminution for possible traveling expenses or earnings in other employment.

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